

Appeal from decision of Administrative Law Judge John R. Rampton, Jr., dismissing appeals from decisions reducing in part authorized grazing use. UT-050-82-3.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Grazing Leases and Permits--Grazing Permits and Licenses: Cancellation or Reduction--Taylor Grazing Act: Generally

A decision by BLM reducing authorized livestock grazing use pursuant to 43 CFR 4110.3-2(b) in order to facilitate achieving multiple-use management objectives, viz., allocating available forage to a competing antelope herd in the interest of promoting hunting and future transplanting, will not be disturbed absent substantial evidence showing that the decision is improper.

APPEARANCES: Charles Blackburn, et al., pro sese.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Charles Blackburn, et al., 1/ have appealed from a decision of Administrative Law Judge John R. Rampton, Jr., dated May 31, 1983, dismissing their appeals from various decisions of the Area Manager, Henry Mountain Resource Area, Utah State Office, Bureau of Land Management (BLM), dated October 9, 1981, reducing in part their authorized grazing use for sheep in the Terza Flat allotment, 2/ effective November 15, 1981.

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1/ Appellants are Charles Blackburn, Jerry L. Blackburn, E. Kay Blackburn, Clifton Peterson, Clinton Peterson, George K. Oldroyd, Andrew G. Taft, and Russell Peterson.

2/ In his Oct. 9, 1981, decision, the Area Manager, Henry Mountain Resource Area, Utah State Office, BLM, made a 33 percent reduction in appellants' authorized grazing use to be implemented over a 5-year period, in accordance with 43 CFR 4110.3-2(c). The total reduction in authorized grazing use, specified in AUM's (animal unit months), for each affected grazing permittee is as follows: Charles Blackburn--from 6 to 4, Jerry L. Blackburn--from 40 to 27, E. Kay Blackburn--from 57 to 38, Clifton Peterson --from 80 to 54, Clinton Peterson--from 45 to 30, George K. Oldroyd--from 53 to 36, and

In his October 1981 decisions, the Area Manager stated that the reduction in authorized grazing use was due to a need to balance authorized grazing use with the available forage supply. BLM had determined that within the Terza Flat allotment there were 873 acres in good condition, 4,876 acres in fair condition, and 1,529 acres in poor condition. In addition, the Parker Mountain Environmental Impact Statement (EIS) had shown a declining trend in available forage. Accordingly, in the late summer of 1980, BLM conducted a forage inventory which established that authorized grazing use exceeded available forage. Based on the 1980 forage inventory and the land use plan of the Parker Mountain Planning Unit, BLM reallocated the available forage, totaling 453 AUM's, within the Terza Flat allotment as follows: Wildlife--106 AUM's, sheep--253 AUM's, and cattle-- 94 AUM's. <sup>3/</sup> The Area Manager also changed the period of use by appellants from January 10 to February 15, pursuant to 43 CFR 4120.2-1(a). Finally, the Area Manager recognized the overwhelming success of the program of antelope introduction to the Parker Mountain. He concluded that:

Determination of desired wildlife forage allocation on public lands is not only a matter between BLM, Utah Division of Wildlife Resources, and livestock grazers, but a matter of interest to the general public. Throughout the Bureau's land use planning and Environmental Impact Statement process for the Parker Mountain, many opportunities were provided for anyone who wished to express their concerns and desires regarding wildlife and livestock forage allocation. Evaluation of public sentiment and multiple-use considerations resulted in the decision to allocate for current wildlife numbers and allocation of remaining forage, consistent with proper stocking of the range, to livestock. <sup>4/</sup> [Emphasis added.]

(Decision of Clinton Peterson, dated Oct. 9, 1981, at 1).

On November 10, 1981, appellants filed appeals from the October 1981 BLM decisions. Appellants argued that the reduction in available forage was due not to sheep, but to antelope, whose numbers had been allowed to increase unchecked. They stated that BLM should abide by a "Supplemental Agreement

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fn.2 (continued)

Andrew G. Taft--from 51 to 34. Gilbert Hallows, who did not participate in the appeal, was reduced--from 46 to 31.

<sup>3/</sup> We note that the final 1985 allocation to appellants with respect to sheep is 254 AUM's, rather than 253 AUM's (including the Hallows allocation).

<sup>4/</sup> In his October 1981 decisions, the Area Manager also set forth a number of other conditions which would apply to appellants' authorized grazing use, including cancellation of their 10-year grazing permits in favor of annual permits every year until 1985, followed by 10-year permits; management of the sheep on the Terza Flat and Deleeuw allotments as one or two herds; preference rights to any permanent increase in available forage; and monitoring studies in order to reassess the need for the scheduled reductions. On the last point, the Area Manager stated that "[w]here changes are justified, the scheduled suspension shall be modified by a decision reflecting the appropriate authorized use and suspended preference," pursuant to 43 CFR 4110.3-2(e).

and Management Plan--Parker Mountain Antelope Herd Unit" (Supplemental Agreement), dated February 1965, between BLM and the Utah Department of Fish and Game. Under that agreement, BLM and the State had agreed to the management of an antelope herd in the area of Parker Mountain and the adjacent vicinity, comprising 167,640 acres of public land, 57,850 acres of State Land, and 19,460 acres of private land, as follows:

It is recognized that an initial plant of 129 antelope has been made on State owned lands upon Parker Mountain. It is stipulated that the initial plant will be allowed to increase to not to exceed 400 antelope and that this increase in numbers by natural reproduction will be allowed so long as there is no serious conflict with proper range management objectives or other land uses and so long as range conditions are suitable, as determined by each agency on lands under their respective jurisdiction. Adjustments in the optimum herd size will be jointly determined in future years based on habitat studies, range condition, and available forage. The herd population will be regulated by either transplanting animals to other areas, or by hunter harvest as deemed advisable by recommendations of the Interagency Committee to the Board of Big Game Control. [Emphasis added.]

On October 20, 1982, a hearing was held before Administrative Law Judge Rampton in Richfield, Utah. The evidence presented by representatives of BLM is summarized by the Administrative Law Judge in his May 1983 decision at pages 2-5:

James G. Buchanan, a range conservationist with the BLM, was in charge of a range survey made in August 1980, within the Terza Flat Allotment. Under his supervision, three crews of two people each did a weight estimate forage survey in the method prescribed in the BLM Manual. The area was mapped into dominant vegetation types and vegetation production determined. Thirty-six 9.6 plots were set out within the allotment by a transect method. The vegetation within the plots was clipped and weighed to determine the amount of forage available for consumption. This method does not establish trends--only forage available. Mr. Buchanan characterized 1980 as a fairly good growth season, with a good spring rain in May, dry summer in June and July, and good fall rains in September. The data obtained was given to the Area Manager's staff for final determination of availability of forage for the different animals using the allotment.

Jan Knight, a trained range conservationist for the BLM, correlated the information from the write-up sheets by the survey crews and, through instructions given by management, assigned the obligations for wildlife (deer and antelope). The forage that was left was distributed between the two classes of livestock (cattle and sheep) on the allotment. Sixty-five AUMs were allocated for antelope on the basis of nine antelope per one AUM. The number of AUMs assigned to the antelope was taken from the Parker Mountain Environmental Impact Statement (EIS) which was completed in 1980.

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Karl J. Thurgood, team leader for the Henry Mountain EIS, is familiar with the Terza Flat Allotment and has inspected an exclusionary enclosure on the allotment, which shows what effect different animals are having on the vegetation. He assisted in conducting trend studies within and outside the enclosure. Inside the enclosure he observed desirable plants having more vigor and more growth than those outside. Outside the enclosure there were thick growths of undesirable plants such as halogeton, which is poisonous to cattle, and which invades disturbed or overgrazed lands.

Prior to the preparation of the EIS, a management framework plan was prepared by the Richfield District. After consultation with those having a knowledgeable interest and expertise in the area, a multiple-use recommendation was made with an attempt to mitigate or minimize the adverse effects of any of the recommendations. Input was taken from the State Fish and Game Department which recommended the number of deer and antelope to be placed on allotments in the Parker Mountain Planning Unit. Six hundred head each of antelope and sheep were allowed.

In 1978 and 1979 the actual number of antelope counted from the air was 738. It was a year of heavy snows, and most of the antelope were concentrated around the Terza Flat area. Those figures were furnished to the Area Manager in the preparation of the Environmental Impact Statement. Consideration was given to the agreement between the BLM and Fish and Game, but there was no effort by the BLM to limit the number of antelope to the 400 head.

Public meetings were held on the results of the studies presented. The EIS pointed out that 750 antelope could not be superimposed on the allotment, along with the authorized livestock, without being detrimental to the range. The Utah Fish and Game Commission determined that the antelope were more beneficial than the livestock use because of the extremely high interest of the public in hunting antelope. There are 19 applicants for every permit available; and, further, the Henry Mountain antelope is the most productive herd in the State of Utah, and the Utah Division of Wildlife is using that herd as a reservoir for establishing antelope elsewhere on a transplanting program. In essence, the hunters have precedence over stockmen.

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Larry G. Sipp, Area Manager for the Henry Mountain Resource Area, stated he based his decision on information in the EIS, from the management framework plan which tells him that the trend was downward, and from the forage study. He stated that further studies will be made to determine if additional cuts are necessary

after the initial 10 per cent cut. The downward trend started in 1965, and placing of the antelope on the allotment has had an impact on that trend. He agreed that the Fish and Game is going to have to do something in the future to put a lid on the antelope herd above 1,023, which is even higher now than the 750 level, and closer to 1,023.

In his May 1983 decision, Judge Rampton concluded that appellants had not established that the BLM survey of the range capacity of the Terza Flat allotment was inaccurate either because the survey methods used were incapable of yielding accurate information, there was a material departure from prescribed procedures, or a demonstrably more accurate survey had disclosed a different range capacity. See O. J. Cooper, A-30974 (Apr. 29, 1969). Accordingly, he dismissed appellants' appeals.

In their statement of reasons for appeal, appellants contend that the reduction in available forage is due to the excessive number of antelope in the Terza Flat allotment, and imply that BLM should enforce the 1965 Supplemental Agreement in order to make more forage available for sheep.

Appellants' grazing permits were issued pursuant to section 3 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315b (1976). It is well established that implementation of the Taylor Grazing Act, as amended, 43 U.S.C. §§ 315-315o (1976), is committed to the discretion of the Secretary of the Interior. E.g., Claridge v. Bureau of Land Management, 71 IBLA 46 (1983). Section 2 of the Taylor Grazing Act, 43 U.S.C. § 315a (1976), specifically charges the Secretary with respect to grazing districts on public lands to "make such rules and regulations" and to "do any and all things necessary \* \* \* to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range." 43 U.S.C. § 315a (1976). The objective of the Act is to provide the most beneficial use of the public range while promoting and stabilizing livestock grazing interests in the districts created. See Hatahley v. United States, 351 U.S. 173, 177 (1956); United States v. Fuller, 442 F.2d 504, 507 (9th Cir. 1971). Moreover, section 402(e) of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. § 1752(e) (Supp. V 1981), which also applies to the issuance of grazing permits, states that the Secretary "may reexamine the condition of the range at any time and, if he finds on re-examination that the condition of the range requires adjustment in the amount or other aspect of grazing use, that the permittee or lessee shall adjust to the extent the Secretary concerned deems necessary."

[1] The applicable regulation, 43 CFR 4110.3-2(b), provides authority for BLM to reduce authorized grazing use in certain circumstances:

When authorized grazing use, which includes active use and any approved nonuse, exceeds the amount of forage available and allocated for livestock grazing within an allotment, or where reduced grazing use is necessary to facilitate achieving multiple-use management objectives for the allotment, the authorized grazing use shall be reduced to the livestock grazing capacity.

In this case, the Area Manager determined that a reduction in appellants' grazing allotments was appropriate based on information and recommendations provided in the management framework plan, the EIS, and the forage survey, that the allotment is in poor condition.

Appellants do not challenge the authority of BLM to reduce their authorized grazing use and present virtually no evidence that BLM's determination of range capacity was in error. A determination by BLM of the grazing capacity for livestock will not be overturned absent a clear showing of error. Ruskin Lines, Jr. v. Bureau of Land Management, 76 IBLA 170 (1983). Appellants argue that BLM's failure to abide by the 1965 Supplemental Agreement with the State, to set a maximum limit of 400 on the number of antelope in the Parker Mountain area, which includes the Terza Flat allotment, has resulted in an increased antelope population and an inequitable distribution of available forage in favor of the antelopes. See Tr. 40-41.

It is unclear from the record how many antelope use the Terza Flat allotment at any one time during appellants' authorized period of use, January 10 to February 15. See Tr. 40. The significant numbers cited by Judge Rampton apparently relate to the total size of the antelope herd, which is not congregated in Terza Flat, but rather, to some extent, may be spread over the several allotments which make up the antelope's critical winter range. See Tr. 107, 132-33. However, BLM in its land use planning, apparently based on estimated use, allocated 65 AUM's to antelope in the Terza Flat allotment. 5/ In any case, it is clear that the total size of the antelope herd exceeded the 400 antelope limit set in the 1965 Supplemental Agreement at the time of the October 1981 BLM decisions.

The 1965 Supplemental Agreement, however, provides for future adjustments in "optimum herd size," through joint determinations by BLM and the Utah Department of Fish and Game. The record establishes that through the land use planning process the State and BLM made a joint determination to increase the allowable limit on the number of antelope to current numbers, which were finally estimated to be 750. See Tr. 38-9, 104-07. In fact, Thurgood, a BLM team leader for EIS work, stated that the 1965 Supplemental Agreement was taken into consideration in this process (Tr. 109). This determination was based on the need for a larger herd for hunting and for future transplanting. See Tr. 113-14. Indeed, in one of his October 1981 decisions, noted, supra, the Area Manager specifically stated that, based on multiple-use considerations, the decision had been made to allocate forage first consistent with "current wildlife numbers" (Decision of Clinton Peterson, dated October 9, 1981, at 1). Moreover, such a decision was made in accordance with 43 CFR 4110.3-2(b) which states that reduction of authorized grazing use shall be done when "necessary to facilitate achieving multiple-use management objectives."

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5/ The record indicates that allocations made for antelope in the other allotments in the Parker Mountain area have also resulted in cuts in authorized grazing use (Tr. 39-40).

Appellants apparently believe that, in terms of BLM management of the public rangeland, livestock must take precedence over wildlife. Nothing in the Taylor Grazing Act, supra, or the other statutes applicable to range management, viz., Subchapter IV of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1751-1753 (1976), and the Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901-1908 (Supp. V 1981), mandates such a preference.

It is clear that the range condition is in a downward trend, and that reduced allocations are warranted to protect the range. Obviously, the decision on the allocation of forage within the Terza Flat allotment required BLM to balance the competing interests of the Federal permittees and the antelope because of the undenied competition between sheep and antelope for the available forage. Such a multiple-use determination was consistent with the dictate of section 102(a) of FLPMA, 43 U.S.C. § 1701(a) (1976), that management of the public land be "on the basis of multiple use \* \* \* unless otherwise specified by law." The record indicates that such a multiple-use determination was made by BLM, favoring the antelope.

While appellants have voiced their disagreement with the BLM distribution of available forage between livestock and wildlife, they have not met their burden of proving by substantial evidence that the BLM decision was in error. Claridge v. Bureau of Land Management, supra at 50.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier  
Administrative Judge

We concur:

Franklin D. Arness  
Administrative Judge

Will A. Irwin  
Administrative Judge

